WONG MEE SIENG

v.

PP

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CRIMINAL APPEAL NO: 41-6-1998]
20 JULY 1999

CRIMINAL PROCEDURE: *Police investigation - Cautioned statement - Recording officer merely read caution to accused - Whether insufficient - Whether caution must be explained - Fact that caution explained to accused not stated in cautioned statement itself - Whether oral evidence of police officer stating that caution explained admissible - Whether such evidence amounts to contradicting or varying or adding to cautioned statement - Evidence Act 1950, ss. 91 & 92*

CRIMINAL LAW: *Gambling Ordinance Cap. 138 - Section 4(c) - Proof of possession - No evidence showing accused had sole control and use of premises wherein offending exhibits found - Person other than accused signed search list as the occupant - Whether element of possession not proved beyond reasonable doubt*

EVIDENCE: *Expert evidence - Expert not giving reasons - Whether expert evidence inadequate to enable court to form own judgment - Whether evidence of gaming expert without explanations or reasons do not prove that offending exhibits were lottery tickets*

The appellant was convicted of an offence under s. 4(c) of the Gambling Ordinance Cap 138 and was fined two thousand ringgit in default two months' imprisonment. The pertinent facts leading to this appeal were as follows. The police had searched certain premises and found two men and three women in the living room. In another room, the police found a plastic bag containing six pieces of paper master list, 50 pieces of paper with illegal 4D numbers written thereon and 24 small pieces of paper with illegal 4D numbers written thereon ('the offending exhibits'). The appellant was found in another room. The search list in the instant case was not signed by the appellant but by one Nge Siew Kui who signed the same as the occupant. When recording the appellant's cautioned statement, the recording officer had read the caution to the accused and this was interpreted to the accused by one PC Angela ('DPW2'). Although the cautioned statement did not show that the caution was explained to the appellant, DPW2 had testified that she did in fact explain it

to the appellant. The gambling expert ('PW5') in the instant case, whilst testifying, did not explain certain terms that he used nor did he explain how he calculated the total stakes wagered.

The grounds of appeal relied on by the appellant were, *inter alia*, (i) that the cautioned statement ought not to have been admitted because the caution was not explained to the appellant; (ii) that the prosecution had failed to prove that she had sole control and use of the premises wherein the offending exhibits were found and thus the appellant had no actual possession of any lottery ticket; and (iii) the testimony of PW5 as a gaming expert was wanting since he did not give any reasons or explanations for his opinion.

Held:

[1] The alleged explanation of the caution was not stated in the cautioned statement. The oral evidence of PW2 that she had explained the caution to the appellant is not admissible because, by virtue of ss. 91 and 92 of the Evidence Act 1950, oral evidence given during the trial to contradict or vary or add to the cautioned statement would be excluded. As such, there was no evidence to show that the caution was explained to the appellant by DPW2. Further, the recording officer merely read the caution to the appellant. He did not explain the caution and its consequences to the appellant and thus the cautioned statement is inadmissible.

[2] There was no evidence to show that the appellant was the owner of the said premises. Neither was there any evidence to show that the appellant rented the whole premises. Taken together with the fact that another person signed as the occupant on the search list, the appellant did not have sole control and use of the premises. Thus, the prosecution had failed to prove the element of possession beyond reasonable doubt.

[3] PW5's evidence as a gaming expert was wanting. He did not give any reasons or explanations for his opinion. The expert evidence was not adequate to enable the learned magistrate to form his own judgment that the offending exhibits were lottery tickets and/or that they were documents of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery. As such, the prosecution failed to prove beyond reasonable doubt that the offending exhibits were lottery tickets and/or that they were documents of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.

[Appeal allowed; conviction and sentence quashed.]

Case(s) referred to:
Chan Chan Seng v. PP [1932] MLJ 107 ***(refd)***
Chan Pean Leon v. PP [1956] 22 MLJ 237 ***(refd)***
Lee Boon Gan (f) v. Regina [1954] 20 MLJ 103 ***(refd)***
Mohamed Yusof Hj Ahmad v. PP [1983] 2 MLJ 167 ***(refd)***
Ong Yap Chang v. PP [1962] 28 MLJ 46 ***(refd)***
PP v. Chiong Phing Lung [1998] 3 CLJ 932 ***(refd)***
PP v. Ha Jong Ru [1980] 2 MLJ 256 ***(refd)***
PP v. Kadir Awang [1989] 2 MLJ 33 ***(refd)***
PP v. Kong Tshoi Kiew [1996] 2 CLJ 1052 ***(refd)***
PP v. Lee Ee Teong [1953] 19 MLJ 244 ***(refd)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652 ***(refd)***
PP v. Tay Bee Seng [1993] 1 CLJ 526 ***(foll)***
PP v. Tan Kian Ho [1998] 4 Journal of Crime 449 ***(refd)***
Rex v. Soh Eng Chiang [1937] MLJ 247 ***(refd)***
Sim Ah Song & Anor v. Rex [1951] 17 MLJ 150 ***(refd)***
Wong Wiew Hock v. PP [1997] 3 CLJ 255 ***(refd)***

Legislation referred to:
Gambling Ordinance (Cap 138), ss. 4(c), 20(A), 28
Criminal Procedure Code, s. 113

For the appellant - Wong Sing Nang; M/s Wong, Orlando Chua & Co
For the respondent - Awang Armadajaya Awang Mahmud DPP

Reported by S Dharmendran

JUDGMENT

Tee Ah Sing J:

Wang Mee Sieng ("the appellant") was on 28 May 1997 convicted of an offence under s. 4(c) of the Gambling Ordinance Cap. 138 ("the GO") and was fined RM2,000 in default two months' imprisonment.

This is an appeal against the conviction and sentence.

The learned counsel for the appellant in his written submission contended, *inter alia*, as follows:

Ground 2 of the petition showed that the learned magistrate erred in law and in fact in admitting the cautioned statement of the appellant as exh. P19.

PW6 at p. 54 of the record of appeal said:

> Before recording statement, I read to the accused the caution under section 113 of the Criminal Procedure Code in Bahasa Malaysia and it was interpreted by PC Angela in Foochow. At same time, PC Angela informed me that the accused understood the caution.

Although DPW2 told the court that she did in fact explain the caution to the appellant during the recording of P19, but in P19 there is no evidence to show that the caution was explained by DPW2 in Foochow to the appellant so the learned magistrate was bound by the decision in *Public Prosecutor v. Tay Bee Seng* [1993] 1 CLJ 526.

The mere reading/interpretation of the caution to the appellant by DPW1 and DPW2 does not mean the caution was explained to the appellant as interpretation is not equal to explanation. In support the case of *Public Prosecutor v. Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652 was cited.

It was also submitted it is also rather odd that the court was told by PW4 C/Inspector Nancy Chin that when the appellant was brought before her, the appellant was crying and scared. But DPW1 and DPW2 both told the court that when the appellant was brought to them, DPW1 said she was "normal", "quite friendly" and DPW2 said "normal' and "even smile".

The sudden transformation of the appellant is suggested to have been caused by promises or inducement given by PW4 to the appellant in order to calm the appellant down and to persuade her to co-operate with the police. It might also be the reason why she was arranged to have her statement recorded that evening and released on police bail the same evening. It was submitted that the learned magistrate thought that the above was a mere assumption by the defence counsel but the learned magistrate erred in law and in fact in failing to scrutinise the evidence and surrounding circumstances in order to determine the voluntariness of the cautioned statement. In support the following cases were cited:

(a) *Mohamed Yusof bin Haji Ahmad v. Public Prosecutor* [1983] 2 MLJ 167

(b) *Public Prosecutor v. Kadir bin Awang* [1989] 2 MLJ 33.

In respect of grounds 6, 7, 8 and 9 of the petition, it was submitted that it is apparent the appellant had no actual possession of any lottery ticket. The facts showed that the appellant had not sole control and use of the premises. The learned magistrate erred in law in failing to direct his mind sufficiently if at all that at the material times there were other occupants at the said premises in question and in particular the same's guilty pleas.

Ground 7 of the petition showed that the learned magistrate erred in law and in fact in concluding that the appellant was the occupier of the said premises in question when the search list (P2) was not signed by the appellant. In support the case of *Public Prosecutor v. Ha Jong Ru* [1980] 2 MLJ 256 was cited.

It was also submitted that there is no presumption or possession. The presumption can only arise after possession has been proved.

On the meaning of "possession" the cases of *Lee Boon Gan (f) v. Regina* [1954] 20 MLJ 103 and *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237 were cited.

The prosecution has failed to adduce any evidence to show that the appellant was the owner of the premises. As such there is no nexus between the appellant and the exhibits seized were found in her possession and thus the prosecution has failed to prove possession. In support the following cases were cited:

(a) *Public Prosecutor v. Chiong Phing Lung* [1998] 3 CLJ 932.

(b) High Court Sibu Criminal Appeal No. 20-41-13 of 1997 – *Teo Kun Huat v. Public Prosecutor* (unreported).

(3) In respect of grounds 1, 3, 4 and 5 of the petition, it was submitted that the important question is whether P11, P12 and P13 are copies of lottery tickets and record of stakes relating to any lottery. There is no presumption under the GO that any paper with 4-D numbers are lottery tickets or record of stakes relating to any lottery.

Section 2 of the GO defines what is a "lottery ticket". So the prosecution must establish that (1) the number chosen, (2) the stake amount of bet, (3) the date drawn, (4) the papers or documents or writing purporting to be a lottery ticket will entitle the holder on the happening of the event or contingency which decide the lottery receives money or money's worth. In support the following cases were cited:

(a) *Chan Chan Seng v. Public Prosecutor* [1932] MLJ 107.

(b) *Public Prosecutor v. Lee Ee Teong* [1953] 19 MLJ 244.

Before the prosecution can invoke the presumption under s. 20(A) of the GO, the prosecution must prove the following:

(a) selling, offering for sale, giving or delivering or collecting lottery tickets;

(b) found in possession of ten or more

(i) lottery tickets; or

(ii) counterfoils or duplicates of lottery tickets;

(c) found in possession of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.

On the question of expert evidence the following cases were cited:

(a) *Sim Ah Song & Another v. Rex* [1951] 17 MLJ 150.

(b) *Public Prosecutor v. Lee Ee Teong* [1953] 19 MLJ 244.

(c) *Rex v. Soh Eng Chiang* [1937] MLJ 247.

(d) *Ong Yap Chang v. Public Proseuctor* [1962] 28 MLJ 46.

(e) *Public Prosecutor v. Kong Tshoi Kiew* [1996] 2 CLJ 1052

(f) *Wong Wiew Hock v. Public Prosecutor* [1997] 3 CLJ 255.

(g) *Public Prosecutor v. Tan Kian Ho* [1998] 4 Journal of Crime 449.

(h) *Public Prosecutor v. Chiong Phing Lung* [1998] 3 CLJ 932.

There was not any evidence or documents tendered to show that there was a draw on the abovementioned dates. The court cannot take judicial notice of the draw of Magnum Corporation Berhad.

The testimony of PW5 as gaming expert was wanting. He has not given any reasons or explanation for his opinion. (See *Wong Wiew Hock v. Public Prosecutor* [1997] 3 CLJ 255).

The learned deputy public prosecutor ("the DPP') in his oral submission contended, *inter alia,* as follows:

(1) There is no evidence whatsoever that any inducement threat or promise operating in the mind of the appellant during the recording of the statement.

(2) The word "interpretation" necessitates the explanation as to the consequences of the action and the mechanics of the language must be properly appraised before something is said to be interpreted. The cautioned statement itself at p. 99 of the appeal record clearly show this position. The learned magistrate was correct that there did not appear to have been any inducement, threat or promise.

(3) The learned DPP conceded that the evidence of PW1 by itself does not show exclusive custody of the exhibits. It must be taken in the totality of the evidence and indeed the cautioned statement which was rightfully admitted by the learned magistrate been voluntary in nature explains the whole scenario.

(4) The learned DPP agreed that the search list was not signed by the appellant but by Nge Siew Kui. The search list is merely corroborative in nature and it is merely an acknowledgment. The nexus between the exhibits and the appellant is linked by the cautioned statement. In our present case the charge was one of assisting in carrying out a public lottery not being the principal carries out the public lottery herself. So the issue of ownership is not as crucial as it would be if the appellant was charged for being the principal and not as an agent.

(5) On the issue of the expert evidence there is a presumption in s. 28 of the GO but the bottom line is the question whether the learned magistrate understands the evidence or is fully satisfied to enable the court to come to a proper conclusion.

From the grounds of judgment it is clear that the learned magistrate was satisfied with the explanation and he was able to form a conclusion. On the totality of the evidence, the learned magistrate was correct in law and fact when he called the appellant to enter defence.

I shall first deal with ground 2 of the petition of appeal.

ASP Tan Boon Sing (PW6) the recording officer at p. 54 of the record of appeal said:

> Before recording statement I read to the accused the caution under section 113 of the Criminal Procedure Code in Bahasa Malaysia and it was interpreted by PC Angela in Foochow. At same time, PC Angela informed that the accused understood the caution.

In the trial-within-a-trial PW6 was referred to as DPW1. DPW1 in cross-examination at p. 57 of the record was asked as follows:

> Q.: Saya mengesahkan bahawa saya telah menterjemahkan ... This is what interpreter told you?
>
> A.. Yes.
>
> Q.: What is the purpose of interpreter signing here?
>
> A.: To show that it was interpreted by the interpreter.

L/Cpl. Angela Hung (DPW2) at p. 58 of the record of appeal, during the *voire dire*, said "I interpreted from Bahasa Malaysia to Foochow and from Foochow to Bahasa Malaysia." And at p. 59 of the record of appeal DPW2 said: "Then he cautioned her under s. 113 Central Police Station (*sic* Criminal Procedure Code). Inspector Tan cautioned her in Bahasa Malaysia. I interpreted to accused in Foochow. I asked her whether she understood, she said she did. Before that, I explained to her the meaning of caution."

DPW2 in cross-examination at p. 60 of the record of appeal said:

Q.: On evening in question, you were there as interpreter, nothing more?

A.: Yes.

Q.: One of your ... was to interpret the statutory caution read by Inspector Tan?

A.: Yes.

Q.: Refer page 2 1D19, 1st para. "saya mengesahkan ... that was your job and that was correct?

A.: Yes.

Q.: Everything that was said between yourself and defendant would be reflected in ID19?

A.: Yes.

Q.: You explained to her the meaning of caution, you interpreted the word in Foochow to defendant?

A.: Yes.

In the cautioned statement (P19) it is stated "Sebelum mencatitkan percakapan dari Wong Mee Sieng saya membacakan amaran berikut kepadanya". And in p. 2 lines 11 to 15 of P19 reads "Saya mengesahkan bahawa saya telah menterjemahkan amaran diatas dalam bahasa cina Foochow kepada Wong Mee Sieng." However, in P19 it is not stated that DPW2 did explain the caution to the appellant.

In *Public Prosecutor v. Tay Bee Seng* [1993] 1 CLJ 526 His Lordship Hj. Abdul Malik bin Hj. Ishak JC (as he then was) at p. 531 said:

> Whatever was said orally by Inspector Syed Talib and WPC Tan that run counter to ID14 would attract the provisions of ss. 91 and 92 of the Evidence Ordinance. Section 91 of the Evidence Ordinance applies to criminal trials, and it categorically states that –
>
> > ... in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of the matter except the document itself ...
>
> The purported cautioned statement (ID14) was reduced into writing (typewritten) after the arrest of the accused under s. 37A(b) of the Dangerous Drugs Act and s. 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary or add to what was set out in writing (ID14). (See *Ah Mee v. PP* [1967] 1 MLJ 220). Hence, whatever oral evidence which Inspector Syed Talib and WPC Tan gave during the trial within the trial to contradict or vary or add to ID14 would in the circumstances be an afterthought, an embellishment so to speak to strengthen their evidence.

I am of the view that oral evidence of DPW2 that she has explained the caution to the appellant is not admissible in evidence. As such there is no evidence to show that the caution was explained to the appellant by DPW2.

In *Public Prosecutor v. Mohd Fuzi b. Wan Teh & Anor* [1989] 2 CLJ 652 His Lordship Shaik Daud J. (as he then was) at p. 654 said:

> On the first issue that is that the caution was not explained to the accused I tend to agree. PW8 in his evidence said that he 'read' the caution as in s. 37A of the Dangerous Drugs Act 1952 and nowhere did he say that he explained it as well. A man may be literate enough to be able to read but to understand and know what the consequences of what was being read to him is entirely another thing, more so when we are dealing with language of the law. It is my view that administering of the caution should not be merely a mechanical exercise of just reading it to the accused person. PW8 should have not merely read the caution but also explained it and its consequences to the accused. This he did not do.

In our case the recording officer merely read the caution to the appellant. He did not explain the caution and its consequences to the appellant. As such the cautioned statement (P19) is inadmissible.

I shall next deal with grounds 6, 7, 8 and 9 of the petition of appeal.

According to Chief Inspector Bakar Sebau (PW1) at the living room he found that there were two men and three women sitting. Then he opened the door in one room which was nearby a toilet. In this room he found one plastic bag kept inside a cupboard. The plastic bag contain six pieces of paper master list (P11(a-f)), 50 pieces of paper believed written with illegal 4D number (P12 (a-e)) and 24 pieces small paper believed written with illegal 4D number (P13) (at p. 38 of the appeal record)

At p. 40 of the appeal record PW1 testified that he found another two rooms which were locked. And in one of the two rooms he found two ladies, one of them was the appellant.

In this case there is no evidence adduced that the appellant is the owner of the said premises. There is also no evidence adduced that the appellant rented the whole premises.

PW1 in cross-examination stated that in the search list (P2) the name Nge Sui Kiew (K132818) appears and she signed as the occupant.

PW1 has stated in cross-examination (at p. 41 of the appeal record) that he was aware that Nge Sui Kiew and four other persons have pleaded guilty. The facts show that the appellant had not sole control and use of the premises.

The prosecution has failed to adduce evidence that the appellant was found with possession of exhs. P11(a-f), P12(a-e) and P13(1-24). As such, the prosecution has failed to prove the element of possession beyond reasonable doubt. On this ground alone, the appellant is entitled to be acquitted and discharged without defence being called.

I shall also deal with grounds 1, 3, 4 and 5 of the petition of appeal.

Chief Inspector Tieu Leong Seng (PW5) has testified that he is a gambling expert. PW5 (at p. 52 of the appeal record) has stated "After examination, exh. P11(a-f) is a master schedule. It was dated 5, 7 and 9 September. All bets have been recorded on these master schedule. It is a record of stake. It is to indicate number sold to the agent". PW5 did not give explanation what is a master schedule and record of stake.

PW5 also testified that exh. P12(a-e) are the record of stake received by the operator and the operator will put inside the master schedule. There are 4,660 number of ticket with a total stake RM12,886.70. There is no explanation as to how the total amount of stakes in respect of each lottery ticket was calculated.

PW5 also testified that "exh. P13 (No. 1-23) are recorded with 2,587 illegal 4D lottery tickets with total stake of RM7,062.10." Here there is also no explanation as to how the total amount of stakes in respect of each lottery ticket was calculated. PW5 has also stated that "Circle in one figure shows permutation bet and shows bet of 50c." PW5 has not given any explanation what is meant by permutation bet.

It is clear from PW5's evidence as a gaming expert was wanting. He has not given any reasons or explanation for his opinion. I am of the view that the expert evidence was not adequate to enable the learned magistrate to form his own judgment that exhs. P11(a-f), P12(a-e) and P13(1-24) were lottery tickets and/or that they were documents of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.

As such, the prosecution has not proved beyond reasonable doubt that exhs. P11(a-f), P12(a-e) and P13(1-24) were lottery tickets and/or that they were documents of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.

In view of the foregoing, I therefore allow the appeal and quash the conviction and sentence. The fine, if paid, is to be refunded to the appellant.